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EXAMINER

WELDON, K

ART UNIT

PAPER NUMBER

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 13

Application Number: 08/975,284
Filing Date: 11/20/1997
Appellant(s): Thermos

MAILED

APR 14 2000

GROUP 1700

BLAKELY, SOKOLOFF, TAYLOR & ZAFMAN LLP
For Appellant

EXAMINER'S ANSWER

This is in response to appellant's brief on appeal filed March 2, 2000.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

The brief does not contain a statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the

Art Unit: 1734

pending appeal is contained in the brief. Therefore, it is presumed that there are none. The Board, however, may exercise its discretion to require an explicit statement as to the existence of any related appeals and interferences.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is incorrect.

Claims 1-12 are rejected.

Claim 13 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is correct.

(7) *Grouping of Claims*

Appellant's brief includes a statement that claims 1,2, 3,4,5/6,7/8,9,10,11,12 and 13 do not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

Art Unit: 1734

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

The following is a listing of the prior art of record relied upon in the rejection of claims under appeal.

✓ 874,666	RODRIGUES-ELY	12-1907
✓ 3,477,112	YERKINS	11-1969
✓ 4,248,384	ZWICKER	2-1981
✓ 3,866,839	MAGNER	2-1975
✓ 3,838,820	PEARCE	10-1974

Art Unit: 1734

(10) *Grounds of Rejection*

The following ground(s) of rejection are applicable to the appealed claims:

35 U.S.C. 102

Claims 1, 5-8 and 12 are rejected under 35 U.S.C. 102(b) as being anticipated by Rodriguez-Ely.

The Rodriguez-Ely patent in figure 1 discloses a nozzle comprising a body member having a tube *a* for passing oxygen, a passage *b* for oxygen and a tube the tube and housing defining an annular chamber in communication with a plurality of radially distributed outlet ports *d*. The figure 1 embodiment shows a coupling means for supplying the oxygen tube but it is unnumbered, the fuel passage *a* inherently must have a coupling means for connecting a supply of fuel to the passage *a*.

Claims 1,4-8, 10 and 12 are rejected under 35 U.S.C. 102(b) as being anticipated by Yerkins 3477112.

The Yerkins patent discloses a body member 24 having a straight bore 28 and an angular bore 32, a concentric tube 26 and a plurality of outlets 48 surrounding the tube outlet.

Art Unit: 1734

35 U.S.C. 103

Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over Rodriguez-Ely in view of Zwicker.

In column 3 lines 60-65 the Zwicker patent discloses constructing the torch from a corrosion resistant material such as stainless steel. It is deemed to have been obvious to one of ordinary skill in the art to incorporate stainless steel to construct Rodriguez-Ely's torch to prevent corrosion.

Claims 3 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rodriguez-Ely in view of Magner .

It is deemed to have been obvious to one of ordinary skill in the art to construct the body member to include integral radially spaced outlets about the center passage for ease in construction.

Claims 4 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rodriguez-Ely in view of Yerkins 3477112

It is deemed to have been obvious to one of ordinary skill in the art to incorporate a flange as taught by Yerkins '112 at 44 about the tube in Rodriguez-Ely to permit quick and ease replacement of all outlets.

Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Rodriguez-Ely in view of Pearce.

Art Unit: 1734

In figures 10/15 of Pearce openings about the central tube are formed by cooperating members such as grooves. It is deemed to have been obvious to one of ordinary skill in the art to form grooves in the bore of the cylindrical portion of the housing member as taught by Pearce to construct the concentric openings in Rodrigues-Ely *thereby reducing drilling costs* (column 1 lines 10-15 of Pearce).

11) Response to Argument

In view of appellant's argument concerning claim 13 it is agreed that the Rodrigues-Ely patent does not disclose threads on the housing for connection to a combustion engine manifold. Claim 13 is deemed to have allowable subject matter and is objected to for being dependent on rejected claim 1.

Claims 1-12 stand rejected.

The appellant principally argues that the Rodrigues-Ely and Yerkins patents fail to disclose a nozzle in combination with an internal combustion engine as recited in claims 1 and 2. The examiner agrees but does not consider the internal combustion engine to be positively recited in the claims. Claim 1, in lines 1-2, recites "a nozzle for providing a nitrous/oxide fuel mixture to a combustion chamber" and in line 3 recites "a body member used in combination with a combustion engine". The appellant is not reciting the engine/nozzle combination but just a nozzle that can be "used" for providing fuel to a combustion engine. Statements of intended use are not

Art Unit: 1734

given any patentable weight in an apparatus claim. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963).

The recitation of a new intended use does not render a claim to an old anticipated apparatus patentable. If the claimed structure is already known it is irrelevant in an anticipation 102(b) rejection whether it has ever been used with a combustion engine. The preamble claim elements have been considered as written by the appellants' and given full weight by the examiner.

With regard to appellant's argument that the tube does not terminate substantially flush with the outlet end of cylindrical portion of the housing the examiner takes the position that although the tube and outlet end of cylindrical portion of the housing might not terminate flush with respect to each other they terminate "substantially" flush as recited in claim 1. The outlet end of the housing abuts up against the integral outlet flange of the tube.

With respect to the appellant's arguments that the Rodrigues-Ely and Yerkins patents are employed as torches supplied with a combustible gas and oxidizing gas unlike the nitrous/oxide and liquid fuel mixture of the claimed invention the examiner notes that the appellant has not positively recited nitrous/oxide and liquid fuel supply sources.

Although the nozzles in both Rodrigues-Ely and Yerkins do not expressly disclose all of these functional limitations the passages in Rodrigues-Ely and Yerkins are inherently capable of supplying nitrous/oxide and liquid fuel therethrough. Further, if nitrous oxide and liquid fuel are

Art Unit: 1734

supplied to the first and second channels in Rodrigues-Ely and Yerkins nitrous oxide emerging from the second tube outlet would expand radially as it exited the outlet end of the tube atomizing the surrounding concentric fuel streams. The appellant has not shown that Rodrigues-Ely and Yerkins would not function to inject fuel as the claimed invention. The Court of Appeals of the Federal Circuit in, In re Schreiber 44 USPQ2d 1429, determined that an oil can spout anticipated a claim reciting a "dispensing top for passing only several kernels of popped popcorn at a time". No popcorn supply was recited in the claims nor did the oil spout reference recite it as having an alternative use as a popcorn dispenser that only lets out several kernels at a time. Claim 1 in Schreiber read as follows;

1. A dispensing top for passing only several kernels of a popped popcorn at a time from an open-ended container filled with popped popcorn, having generally conical shape and an opening at each end, the opening at the reduced end allows several kernels of popped popcorn to pass through at the same time, and means at the enlarged end of the top to embrace the open end of the container, the taper of the top being uniform and such as to by itself jam up the popped popcorn before the end of the cone and permit the dispensing of only a few kernels at a shake of a package when the top is mounted on the container.

The oil can apparatus was determined to have structure that would inherently function to dispense several kernels of popcorn at a time. As shown above the preamble and claim body included numerous references to popcorn kernels and related functional language but the court did not

Art Unit: 1734

consider a supply of popcorn kernels to be positively recited as a limitation and necessary for the oil can spout reference to include popcorn to anticipate the claim. The present claim recites a nozzle for nitrous/oxide and fuel in a combustion engine in the preamble and makes no reference to the cooperative operation between the nitrous/oxide and fuel as it exits the injector nozzle, less functional language referencing the dispensed product than in Schreiber, *supra*. The appellant has not claimed a supply of nitrous/oxide or fuel explicitly or implicitly.

With respect to claim 3 the appellant argues that Magner does not disclose a center bore with radially spaced outlet ports of a size to receive the tube. The appellant's attention is directed to figure 2 where a center tube 64b is shown cooperating with housing 16 having a central passage therein and a plurality of outlets 720 radially positioned thereabout.

The Yerkins patent discloses a central tube 46 having a section 44 at its end that could be broadly interpreted as a flange thereon (claims 4 and 10), The appellant's argument appears to be limiting this term flange more specifically to structure shown and identified as the flange 200 in figures 6 and 7. Note portion "c" in Rodrigues-Ely is considered to be the flange as reasonably interpreted by the examiner.

The Rodrigues -Ely patent does not disclose a coupling member for the angular bore, however it is disclosed in lines 62-70 that gas is supplied thereto. The present claims 5/6 recite that the coupling means "engages" the inlet end of the angled bore. The appellant in the prosecution history has indicated that there are some liquid coupling apparatus that do not engage each other and that the supply to the torch in Rodrigues-Ely could be coupled to the angular bore

Art Unit: 1734

with such means. The examiner takes the position that these coupling means are not well-known in the art and are not used in the torch industry. Such a coupling would be dangerous for a torch, for instance when back pressure builds up at the torch outlet backflow would occur and flames would leak out this non-engaging coupling means creating a dangerous condition for the operator. With respect to Yerkins, the Yerkins patent discloses a coupling means for the angular passage at 52 and the tube with an unnumbered seal sleeve from the supply tube 62.

With respect to the combination of Pearce and Rodrigues-Ely the appellant indicates that the references are incompatible. Specifically, that the Rodrigues with its multi-portal outlets is incompatible with the torch tip in Pearce. Appellant's argument is unclear, the Pearce patent was cited for teaching/substituting its method of constructing concentric radial outlets for the method of formation in Rodrigues. What is incompatible? With respect to motivation for changing the method of construction of a plurality of concentric outlets the appellants attention is drawn to column 1 lines 10-15 of Pearce in which it describes the cost of drilling openings for the surrounding gas outlet openings on torches such as Rodrigues.

With respect to claim 12 the appellant argues that the flow path 32 in Yerkins is parallel to the central axis of the passage 46 in the flow tube. Upon inspection of Yerkins and measurement of the angle between the passage 32 and the axis of passage 46 is slightly greater than 5 degrees.

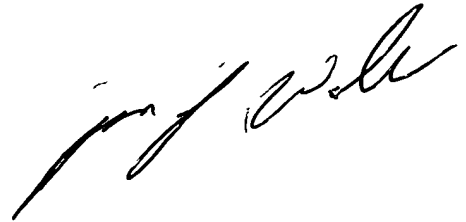
Art Unit: 1734

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "Kevin Weldon", with a date "4/13/00" written below it.

kpw
April 13, 2000

A large, stylized handwritten signature in black ink, likely "Kevin Weldon".

Kevin Weldon
Primary Examiner

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